

November 12, 2003

BANGOR GAS COMPANY, LLC
Petition for Advisory Ruling on Applicability of
35-A M.R.S.A. §§ 902 And 707 to Capital
Contribution by Affiliate, Penobscot Natural Gas,
Or for Exemption (§707)

ADVISORY RULING

I. SUMMARY

Bangor Gas Company, LLC (Bangor Gas) does not require Commission approval under 35-A M.R.S.A. §§ 707 and 902 when it receives infusions of capital from its sole owning member without any change in membership or other interests in the LLC.

II. PROCEDURAL HISTORY AND BACKGROUND

On September 11, 2003, Bangor Gas filed its request for an Advisory Ruling, pursuant to Chapter 110, Part 6 of the Commission's Rules of Practice and Procedure, as to whether Commission approval is required under 35-A M.R.S.A. §§ 901, 902 and 707 when a contribution to capital of a public utility organized as a Limited Liability Company (LLC) is made by its sole member without any change in its membership interests and without the issuance of any additional interests in the LLC. In the alternative, Bangor Gas requests an exemption from the requirement for affiliate interest approval pursuant to Section 707 or approval under Sections 707 and 902, if applicable. Bangor Gas also filed the testimony of Joseph Cote, Vice President and General Manager of Bangor Gas, in support of its application for approval.

III. LEGAL AUTHORITY

Pursuant to Chapter 110, Part 6, of the Commission's Rules of Practice and Procedure, the Commission may make an advisory ruling with respect to the applicability of any statute or rule administered by the Commission to the person's property or to acts or events in which the person has a substantial interest.¹ Bangor Gas seeks an advisory ruling on the applicability of 35-A M.R.S.A. §§ 707, 901 and 902

¹ No Advisory Ruling shall constitute res judicata or legal precedent with respect to the issues raised before the Commission. In any subsequent enforcement action initiated by the Commission, however, any person's justifiable reliance upon the ruling shall be considered in mitigation of any penalty sought to be assessed.

to contributions of the capital of a public utility organized as an LLC by its sole member, when there is no change in membership interest and no issuance of any additional interests in the utility.

Title 35-A, Section 707(3) prohibits a public utility from entering into certain arrangements with an affiliate without written approval by the Commission upon a finding that the arrangement is not adverse to the public interest. The Commission may exempt from section 707(3), for a utility or group of utilities, classes of transactions as it may specify which in its judgment will not be adverse to the public interest. 35-A M.R.S.A. § 707(3)(C).

Section 901 of Title 35-A establishes the circumstances in which a public utility may issue stocks, bonds which may be secured by mortgages on its property, franchises or otherwise, notes or other evidences of indebtedness payable at periods of more than 12 months after the date of issuance. They include acquisition of property, construction or improvement of facilities, improvement or maintenance of service, refinancing, reimbursement and other purposes. Section 902 requires that a public utility obtain from the Commission an order stating that the indebtedness is required in good faith for the purposes enumerated in Section 901.

IV. DISCUSSION AND DECISION

Bangor Gas is a limited liability company. Its affiliate, Penobscot Natural Gas Company, Inc. (Penobscot Gas), is its sole member, owning 100% of the membership interests of the LLC.² Penobscot Gas proposes to make a voluntary contribution of capital to Bangor Gas of \$8,050,000, bringing total capital to \$31,000,000.

The Commission has approved debt and equity levels for Bangor Gas at various stages in its corporate life. Initially, the Commission authorized Bangor Gas to issue membership interests of up to \$17,500,000 in accordance with an operating agreement between joint members, Bangor Hydro-Electric Company and Energy Pacific (now Sempra Energy). See *Bangor Hydro Electric Company, Petition for Authority to Provide Natural Gas Distribution Service to the Bangor Area*, Docket No. 1997-795, Order Granting Unconditional Service Authority (June 30, 1998) at 9. In 1998, Bangor Gas filed to broaden its authorized service area to seven additional municipalities surrounding Bangor and for authority to engage in financing, including issuing up to \$27,540,000 in LLC membership interests to Penobscot Gas. In addition, the Commission allowed Bangor Gas an additional \$5,450,000 in capital contributions, bringing its total capital to \$22,950,000. See *Bangor Gas Company*, Docket No. 98-468, Order (Oct. 22, 1998).³

² Penobscot is a subsidiary of utility holding company Sempra Energy.

³ Through subsequent reorganizations approved by the Commission, Penobscot became Bangor Gas's sole member, owning 100% of its membership interests.

Most recently, the Commission approved, pursuant to 35-A M.R.S.A. §§ 707, 901 and 902, the financing authority application of Bangor Gas to issue an unsecured revolving Promissory Note in the amount of \$45,000,000 to Penobscot with a maturity date of December 31, 2008. The purpose of the loan from Penobscot to Bangor Gas is to finance the construction of future systems and to refinance short-term debt.

Despite these prior rulings, Bangor Gas argues that Sections 901 and 902, on their face, do not apply to the voluntary capital contribution proposed here because Bangor Gas will make no issuance of securities to Penobscot as a result of the contribution. Bangor Gas states that the prior rulings are distinct from the circumstance of this application because those approvals were part of the certification of the Company to provide gas service, involving a review of the reasonableness of the Company's financing plans. Bangor Gas also asserts that this instance is different in kind from Docket Nos. 97-795 and 98-468 because Bangor Gas is not issuing stock, bonds or other evidence of indebtedness. Bangor Gas maintains that it is not incurring any indebtedness and that the member ownership interests will be unaffected by the additional voluntary capital contribution from Penobscot. Finally, Bangor Gas argues that the making of periodic capital contributions to the utility by the sole member of an LLC does not implicate the policy considerations that would cause the review of issuance of additional securities.

Similarly, Bangor Gas argues that, while a contribution of capital could be viewed as an arrangement for furnishing personal property (one of the transactions listed in Section 707 as requiring approval), it does not appear to constitute an exchange between affiliates that would warrant scrutiny by the Commission as to its reasonableness and impact on the interests of the ratepayers.

Section 707(1)(B) defines a "transaction" as any dealings between a public utility and its affiliated interest that affects, directly or indirectly, any accounting entry of the public utility. An infusion of capital would fall within this broad definition. However, Bangor Gas points out that the term "transaction" appears only in the provision requiring any affiliated interest to provide the Commission access to books and records that reflect its transactions with a public utility. Bangor Gas argues that, while a capital contribution is reflected on the books of the utility and is a transaction over which the Commission has documentary access, it is not the type of contract or arrangement that was envisioned by the statute as requiring Commission approval. Rather, Bangor Gas asserts, the statute requires approval only for arrangements in which an affiliate charges some consideration for services or property provided to a utility. Under this statutory interpretation, Bangor Gas argues that the proposed contribution of capital to an LLC by its sole member, without receipt of any security or other value in exchange, is not "a contract or arrangement for the furnishings of any other services of real or personal property" between affiliated parties that requires approval under Section 707(3).

We agree with the statutory interpretation provided by Bangor Gas that in the limited circumstance where Penobscot makes a voluntary capital contribution to Bangor

Gas where no consideration is required of Bangor Gas and no member ownership interests are affected, Commission approval is not required.⁴

This ruling does not imply approval of the Company's capital needs, capital costs or capitalization ratio for rate making purposes, nor does this Order limit or restrict the powers of the Commission in determining or fixing any rate.

Dated at Augusta, Maine, this 12th day of November, 2003.

BY ORDER OF THE COMMISSION

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
 Diamond
 Reishus

⁴ Bangor Gas would need Commission approval to decrease its capital. 35-A M.R.S.A. §910.

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.
2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21 days** of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.
3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.